UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KIPP ACADEMY CHARTER SCHOOL, Employer, and NICOLE MANGIERE AND CHRISTOPHER DIAZ, Petitioner, and UNITED FEDERATION OF TEACHERS, LOCAL 2 AFT, AFL-CIO, Union.	Case 02-RD-191760

BRIEF FOR *AMICI CURIAE* NATIONAL EDUCATION ASSOCIATION, ARIZONA EDUCATION ASSOCIATION, CALIFORNIA TEACHERS ASSOCIATION, COLORADO EDUCATION ASSOCIATION, DELAWARE STATE EDUCATION ASSOCIATION, GEORGIA ASSOCIATION OF EDUCATORS, IDAHO EDUCATION ASSOCIATION, ILLINOIS EDUCATION ASSOCIATION, KANSAS NATIONAL EDUCATION ASSOCIATION, KENTUCKY EDUCATION ASSOCIATION, MASSACHUSETTS TEACHERS ASSOCIATION, MICHIGAN EDUCATION ASSOCIATION, OKLAHOMA EDUCATION ASSOCIATION, OHIO EDUCATION ASSOCIATION, OREGON EDUCATION ASSOCIATION, PENNSYLVANIA STATE EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION-RHODE ISLAND, UTAH EDUCATION ASSOCIATION, VERMONT-NEA, AND WASHINGTON EDUCATION ASSOCIATION

Alice O'Brien
Philip A. Hostak
National Education Association
1201 16th Street, NW, Suite 820
Washington, DC 20036
Telephone: (202) 822-7035

Counsel for amici *National Education Association,* et al.

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STATEMENT OF INTEREST

Amici National Education Association ("NEA"), Arizona Education Association, California Teachers Association, Colorado Education Association, Delaware State Education Association, Georgia Association of Educators, Idaho Education Association, Illinois Education Association, Kansas National Education Association, Kentucky Education Association, Massachusetts Teachers Association, Michigan Education Association, Oklahoma Education Association, Ohio Education Association, Oregon Education Association, Pennsylvania State Education Association, National Education Association-Rhode Island, Utah Education Association, Vermont-NEA, and Washington Education Association submit this brief in response to the February 4, 2019, Order and Invitation to File Briefs issued by the National Labor Relations Board ("Board"), soliciting *amicus* briefs on the question "whether the Board should exercise its discretion to decline jurisdiction over charter schools as a class under Section 14(c)(1) of the Act and, therefore, modify or overrule *Hyde Leadership Charter School–Brooklyn,* 364 N.L.R.B. No. 88, slip op. at 6 fn. 15, 7-9 (2016), and *Pennsylvania Virtual Charter School*, 364 N.L.R.B. No. 87, slip op. at 7, 9-10 (2016)."

NEA is a national labor organization with more than 3 million members, the vast majority of whom are employed in primary and secondary public schools, including public charter schools and other non-traditional public schools. NEA has 52 state-level affiliates—including the 19 state affiliate *amici* here, which collectively represent nearly 1.4 million educator members—as well as some 14,000 local affiliates. *Amici* believe that all educators and education support professionals deserve the right to collective voice and representation so that they can effectively advocate for the high-quality education and

educational standards that students deserve. Accordingly, *amici* believe that where, as here, a state extensively regulates charter schools and extends to charter school employees the same robust collective bargaining protections that it provides for traditional public school employees, the Board should decline to exercise jurisdiction over such employees so that they may enjoy the same robust collective bargaining rights as their counterparts in traditional public schools. As we develop below, this result is consistent with the Board's historical criteria for declining jurisdiction. Accordingly, assuming *arguendo* that the Board does have statutory jurisdiction over New York charter schools, *amici* submit that that the Board should decline jurisdiction.[1]

Given that charter schools are creatures of state law, and given further that state charter school schemes vary markedly among the states that have authorized charter schools, the Board should limit its declination to charter schools governed by the laws of New York. The application of the Board's declination criteria to other states may yield a different outcome, particularly in jurisdictions that fail to require charter school employers to bargain with associations representing their employees or to provide statutory protections for charter school employees who choose to associate for collective bargaining or other mutual aid and protection.

[1] For the reasons set forth in the *amicus* brief filed by NEA, the California Teachers Association, and the Illinois Education Association in *Chicago Mathematics & Science Academy*, 13-RM-001768, *amici* believe that the Board erred in concluding that it has statutory jurisdiction over charter schools where states have significant oversight over charter operations. Recognizing that the Board has ruled otherwise, we confine ourselves to the question of declination raised in the Board's invitation to file briefs.

ARGUMENT

I. THE BOARD HAS BROAD DISCRETION TO DECLINE JURISDICTION AND HAS DEVELOPED STANDARDS FOR EXERCISING ITS DISCRETION THAT SHOULD GUIDE THE BOARD'S ANALYSIS HERE

The Board's statutory jurisdiction extends to "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). But throughout its history the Board "has never exercised the full measure of its jurisdiction." *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 3 (1957). This has held true both before and after Congress expressly authorized declination of jurisdiction as part of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, Section 701(a). As the Supreme Court noted nearly seventy years ago: "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951).

In its early decisions on the subject, the Board often made its declination determinations in an *ad hoc* manner, concluding that the exercise of jurisdiction would not effectuate the policies of the Act where it found that a particular employer's business had an insubstantial impact upon commerce (*see, e.g.*, *Clayton-Dorris Co.*, 78 N.L.R.B. 859 (1948)) and/or where the employer's operations were local in nature, meaning that a labor dispute at the business would be unlikely to have a substantial impact on interstate commerce (*see, e.g.*, *A-1 Photo Serv.*, 83 N.L.R.B. 564, 565 (1949); *Duke Power Co.*, 77 N.L.R.B. 652 (1948)). In 1950, the Board announced that it would establish "standards which will better clarify and define where the difficult line" dividing substantial from

insubstantial impacts on commerce "can best be drawn." *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 636 (1950). Those standards, announced in a series of decisions issued that same year, set business-volume thresholds for certain industries, expressed in dollar amounts, below which it would find an insubstantial effect on commerce. *See Guss*, 353 U.S. at 3-4; Note, *The Discretionary Administrative Jurisdiction of the NLRB Under The Taft-Hartley Ac*t, 62 Yale L.J. 116, 118 (1952). Those thresholds, as expanded and revised from time to time over the years, continue to govern the Board's exercise of its jurisdiction. *See* National Labor Relations Board, An Outline of Law and Procedure in Representation Cases §§ 1-200 through 1-209 (Rev. 2017).

While declining jurisdiction on an *ad hoc* basis or declining jurisdiction over portions of industries using its business-volume thresholds, the Board also at times took a broader approach, declining jurisdiction over entire industries, such as the hotel industry (see *White Sulphur Springs Co.*, 85 N.L.R.B. 1487, 1488 (1949)), most non-profit organizations (see *Philadelphia Orchestra Ass'n*, 97 N.L.R.B. 548, 549 (1951)), and the horse-racing and dog-racing industries (see *Los Angeles Turf Club, Inc.*, 90 N.L.R.B. 20, 22 (1950)).

The Board's declination of jurisdiction sparked little by way of controversy—and indeed had been cited with approval in Supreme Court *dicta*, *see Denver Bldg. & Const. Trades Council*, *supra*—until the Court ruled in 1957 that the states could not regulate labor relations in areas where the Board had declined jurisdiction, thus creating a jurisdictional "'no-man's land'" in which the states were powerless to regulate labor relations even though the Board declined to enforce the Act. *Guss*, 353 U.S. at 10. *See also* Bernard D. Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: I*, 59

Colum. L. Rev. 6, 55-69 (1959); Note, *The Discretionary Jurisdiction of the NLRB*, 71 Harv. L. Rev. 527, 534-38 (1958). Following *Guss*, the Court held that the Board's refusal to exercise jurisdiction over labor unions in their capacities as employers and over employers in the hotel industry as classes was contrary to the Act. *See Office Employers Int'l Union Local 11 v. NLRB*, 353 U.S. 313 (1957); *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958).

In 1959, Congress codified the Board's discretion to decline jurisdiction by adding what is now Section 14(c) of the National Labor Relations Act, 29 U.S.C. § 164(c), thereby legislatively overruling the *Hotel Employees Local 255* and *Office Employers Int'l Union Local 11* decisions and remedying the "no-man's land" problem created by the *Guss* decision. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, Section 701(a). In its first subsection, this statute provides, of relevance here, as follows:

> The Board, in its discretion, may, by rule of decision or by published rules … decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. [29 U.S.C. § 164(c)(1).[2]]

In the second subsection, Congress made clear that in situations where the Board has declined to exercise its statutory jurisdiction, the states are free to regulate labor relations without triggering federal pre-emption: "Nothing in this subchapter shall be deemed to

[2] The first subsection also contains a proviso that the Board may not decline to assert jurisdiction over enterprises meeting Board jurisdictional standards that were in effect on August 1, 1959. *Id.* That proviso does not apply here, as in 1959 the Board had no jurisdictional standards that applied to charter schools (charter schools being a much more recent development), or to any other schools for that matter. *See Leedom v. Fitch Sanitarium, Inc.*, 294 F.2d 251, 254 (D.C. Cir. 1961) (holding that the Section 14(c) proviso only precludes the Board from declining jurisdiction over employers that fell within the "ten definite standards" for exercising jurisdiction that the Board had promulgated prior to the effective date of Section 14(c). *See also id.* at 255-56 (appendix setting forth the jurisdictional standards in effect as of August 1, 1959).

prevent or bar any agency or the courts of any State … from assuming and asserting jurisdiction over labor disputes over which the Board declines … to assert jurisdiction." *Id.* § 164(c)(2).

Before and after the enactment of Section 14(c), the Board exercised its discretion to decline jurisdiction in a wide array of industrial settings. But it developed its rationale for doing so most prominently in decisions and regulatory action explaining its policy of declining jurisdiction over businesses that are part of the horse-racing and dog-racing industries. In its early cases on the subject, the Board ruled, without much elaboration, that the horse-racing and dog-racing industries were "essentially local enterprises" as to which a labor dispute was unlikely to impact commerce. *See, e.g., Los Angeles Turf Club*, 90 N.L.R.B. at 22. But in *Pinkerton's Nat'l Detective Agency*, 114 N.L.R.B. 1363 (1955), the Board, considering whether to decline jurisdiction over a contractor supplying security services to a racetrack, elaborated on this rationale: in support of its conclusion that labor disputes in the industry would not affect commerce, the Board stressed that "the labor relations of the instant employees are … the subject of special laws enacted by the State of New York for the regulation of employment at race tracks and for the representation of race track employees by labor organizations." *Id.* at 1364.

After the enactment of Section 14(c), the Board reconsidered its approach to the racing industries in *Hialeah Race Course, Inc.*, 125 N.L.R.B. 388 (1959), and in so doing developed more fully its rationale for declination, even as it reaffirmed its policy of declining jurisdiction in this area. The Board's analysis in *Hialeah Race Course* focused on three factors: First, the Board carried forward from earlier decisions the inquiry as to whether the employer's operations "are essentially local in nature." *Id.* at 391. Second, the

Board considered the extent to which such employers "are permitted to operate by reason of special State dispensation, and are subject to detailed regulation by the States." *Id.* And finally, the Board again highlighted the importance of state regulation of the employer's labor relations, concluding that "declination of jurisdiction will not leave the labor relations of such operations unregulated." *Id.*

In 1973, the Board codified its approach to these industries by exercising its rulemaking authority and in so doing presented the fullest articulation of its rationale for declination to date. *See* 29 C.F.R. § 103.3. In its explanation of the rule, the Board reiterated and elaborated on the reasons stated in its prior cases, emphasizing, of relevance here, "the extensive State control over these industries," which includes licensing employees and supervising the industries through administrative agencies. Declination of Assertion of Jurisdiction, 38 Fed. Reg. 9537 (April 17, 1973). By reason of the state's involvement in the industry, the Board reasoned, "a unique and special relationship has developed between the States and these industries which is reflected by the states' continuing interest in and supervision over the industries." *Id.* Based on this analysis, the Board concluded that "the operations of these industries continue to be peculiarly related to, and regulated by, local governments and, further, that our exercise of jurisdiction would not substantially contribute to stability in labor relations." *Id.* In that regard, the Board added that "relatively few labor disputes have occurred in these industries, thus reaffirming the Board's earlier assessment that the impact of labor disputes in these industries does not warrant the Board's exercise of jurisdiction." *Id.*

The U.S. Court of Appeals for the Second Circuit rejected a challenge to the Board's decision to decline jurisdiction under this rule in *New York Racing Association, Inc. v. NLRB*,

708 F.2d 46 (2d Cir. 1983), and in so doing engaged in a close analysis of the statute, and the history that led to it, that is highly relevant here.

First, the court explained that the text of 29 U.S.C. § 14(c)(1) "make[s] clear that even if the effect on commerce of disputes in a particular industry is substantial, the Board has the power to make the judgment that the assertion of jurisdiction is not warranted." 708 F.2d at 52. The court then recounted the history behind the enactment of Section 14(c), including the fact that Congress was clearly reacting to the "no-man's land" problem created by the Supreme Court in *Guss*, as well as the subsequent Court decisions holding that the Board could not categorically decline jurisdiction over labor unions and the hotel industry. 708 F.2d at 52-53. The court found that this background, as well as evidence from the amendment's legislative history, further supported the conclusion that Congress intended the Board to continue to exercise broad discretion in making judgments as to when declination of jurisdiction is appropriate. *Id.*

The court elaborated on the nature of those judgments, emphasizing that while the key question is whether labor disputes will impact commerce, the answer to that question involves weighing many factors beyond the relative size of a business, including the extent to which the state regulates the industry, particularly with respect to labor relations:

> The impact of labor disputes on commerce is, of course, the overall guide but the dollar volume of business in interstate commerce is not the only yardstick that the Board can or should consider. Many other factors can be important. For instance, *if the states regulate a given industry adequately, labor disputes in that industry might well be reduced to the point where their impact on commerce would be insignificant, whatever the volume of interstate commerce in the industry*.

Id. at 53 (emphasis added). And in summing up its analysis, the court again stressed that the judgments that the Board must make in determining whether to decline jurisdiction unavoidably involve policy judgments about how best to administer the Act:

> In short, when the Board decides whether the exercise of its jurisdiction is "warranted," it does far more than just measure the volume of commerce involved, taking jurisdiction over the largest industries and declining jurisdiction over the smallest.
>
> Under section 14(c)(1), the Board must make policy decisions about how best to effectuate the purposes of the national labor laws, decisions informed by its special knowledge and expertise. [708 F.2d at 54 (footnote omitted).]

The kinds of policy judgments that the Board made with respect to businesses connected to racetracks are not unique to that industrial setting. Notably, the Board relied on similar reasoning when it declined jurisdiction over a private university in *Temple University*, 194 N.L.R.B. 1160 (1972), a case that remains Board law. In that case, the Board declined jurisdiction on the basis of the "unique relationship" between the institution and the state. *Id.* at 1161. That relationship, the Board found, arose by virtue of the state's subsidization of the university and regulation of the university's tuition, its statutory designation of the university as an "instrumentality" of the state, its requirement that one-third of the university's board be state officials, and its imposition of annual reporting duties on the university. *Id*. Based on those facts, the Board concluded that "[a]lthough the University is in form a private, nonprofit institution," state law "established the University as a quasi-public higher educational institution to provide low cost higher education" for residents of the state and it "would not effectuate the policies of the Act to assert jurisdiction." *Id.*

* * * *

The sum of the foregoing is this: Under Section 14(c) of the Act, the Board has wide discretion to decline jurisdiction over "any labor dispute involving any class or category of employers." 29 U.S.C. § 164(c)(1). This discretionary authority allows the Board to decline jurisdiction over very broad classes or categories of employers (as it continues to do with regard to, *e.g.*, the racing industry), over smaller classes or categories of employers (as it continues to do with employers falling under its jurisdictional minimums), or even over individual employers (as it has done historically and continues to do with, *e.g.*, Temple University). In determining whether to exercise its discretion to decline jurisdiction, the Board unavoidably makes policy judgments about how best to further the purposes of the Act. And over the course of its history, the Board has developed criteria to weigh in making those policy judgments that should guide the Board's analysis here. As we now show, when those criteria are considered in the instant case, they weigh decidedly in favor of the Board's declining jurisdiction over charter schools in New York.

II. THE BOARD SHOULD EXERCISE ITS DISCRETION TO DECLINE TO EXERCISE JURISDICTION OVER NEW YORK CHARTER SCHOOLS

As detailed above, in Board case law and in the only regulation concerning the Board's exercise of its discretion to decline jurisdiction, the following emerge as the most prominent criteria: (1) whether the business is local in nature, meaning that a labor dispute within the sector is unlikely to impact interstate commerce; (2) whether there is a special relationship between the state and the employer by reason of the employer's performance of a state function, the states' involvement in and oversight of the employer's activities, and the state's subsidization of the employer; and (3) whether declining jurisdiction will leave the employers' labor relations unregulated. Here, all of these criteria militate in favor of declining jurisdiction over New York charter schools.

Before turning to the application of these factors, we must re-emphasize a critical overall point, namely that the most appropriate course for the Board to take here is to consider whether to decline jurisdiction over charter schools in New York, rather than charter schools nationwide. That is because charter schools are creatures of state law, and the laws and regulations governing charter schools—which are critical to the declination analysis—vary substantially from state to state.[3] Indeed, the variation in state law is such that the Board's application of the test for determining whether it has *statutory* jurisdiction over charter schools has already yielded different outcomes in different states. *Compare Hyde Leadership Charter School–Brooklyn,* 364 N.L.R.B. No. 88 (2016), and *Pennsylvania Virtual Charter School*, 364 N.L.R.B. No. 87 (2016), *with LTTS Charter Sch., Inc.*, 366 N.L.R.B. No. 38 (2018).

The variation in state law is particularly stark with respect to labor relations, which as we have seen is critical to the Board's declination analysis. While some states extend their public-employee collective-bargaining laws to charter school employees, other states either have no collective bargaining laws at all for public employees, much less such laws that reach charter school employees, or prohibit collective bargaining altogether.[4] For

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[3] Arizona, for example, scarcely regulates charter schools at all. The state permits for-profit companies to form and manage charter schools, *see* Ariz. Rev. Stat. § 15-183(B) and Ariz. Op. Att'y Gen. No. I04-006, 2004 WL 1708196 (July 20, 2004), while imposing no ethics or conflict-of-interest rules on them, and it does not require charter school teachers to be certified, *see* Ariz. Rev. Stat. § 15-183(E)(5). Similarly, in Louisiana, for-profit companies are permitted to manage charter schools, *see* La. Rev. Stat. § 17:3997(A)(1)(b), and charter school teachers need not be certified, *see* La. Rev. Stat. § 17:3991(C)(6). In sharp contrast to New York, neither Arizona nor Louisiana requires public employers—much less charter schools in particular—to bargain with majority representatives of their employees or protect public employees' rights to associate for the purpose of collective bargaining or other mutual aid and protection.

[4] *See* Milla Sanes and John Schmitt, *Regulation of Public Sector Collective Bargaining in the*

these reasons, we urge that the Board refrain from declining jurisdiction over charter schools nationwide but instead focus on the state before the Board here and clearly enunciate its criteria for declination so as to provide a guide for the Board's consideration of the issue in other states.

A. New York Charter Schools Are Local in Character

In New York, there is no reasonable likelihood that labor disputes will occur among charter schools that would have a significant impact on interstate commerce. Charter schools in the state are therefore "local in character" within the intendment of the Board's case law and regulation concerning declination. This is so for two reasons.

The first reason applies to charter schools generally: Although charter schools have existed for decades (the first charter school authorizing statutes having been enacted in 1991 and 1992 in Minnesota and California, respectively), strikes in the charter sector have been rare, and none have occurred in New York. Indeed, it was not until December of 2018 that any charter school employees anywhere in the country went on strike.[5] *Cf.* 38 Fed. Reg. 9537 (citing the "relatively few labor disputes" that occurred in the racing industry in support of declination rule).

And such strikes as may occur in the charter sector are apt to be local events. By their very nature, charter schools typically have decentralized management—that is to say,

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States, Center for Economic and Policy Research (March 2014), available at http://cepr.net/documents/state-public-cb-2014-03.pdf (accessed February 28, 2018).

[5] Manny Ramos, Alice Yin and Lauren FitzPatrick , "First charter school strike in nation eyes Day 2 as Acero teachers walk out," *Chicago Sun-Times* (Dec. 3, 2018), available at https://chicago.suntimes.com/news/ctu-jesse-sharkey-acero-uno-charter-school-teachers-vow-strike-if-demands-arent-met/ (accessed Feb. 28, 2019).

a charter school is governed by its own board of directors rather than by a central school district—and they are not governed by state teacher pay schedules. Accordingly, it is overwhelmingly unlikely that any labor dispute that does occur at a charter school would spill over to encompass an entire district or, as we have seen in the past year among teachers at traditional public schools, an entire state. Even in the case of charter school chains or networks, such as KIPP, where multiple schools fall under a single management umbrella, even the most serious labor dispute could be expected to reach no further than the schools in the network or chain. Indeed, the strike referenced above occurred at a Chicago charter school chain, and the walkout was confined to schools within that chain; it also settled quickly—after four days—when the parties reached an agreement through collective bargaining to, among other things, reduce class sizes and raise pay for teachers and paraprofessionals to better align with their peers in the Chicago public school system.[6]

This latter point brings us to the second reason that labor disputes in New York charter schools sector are unlikely to have significant impacts on interstate commerce—a reason that is particular to New York and other states that have robust collective bargaining procedures for public school employees and have extended them to cover charter school employees. As we have shown, the extent to which state law (absent pre-emption) regulates labor relations in a particular industry is directly relevant to the question whether labor disputes are likely to have a significant effect on commerce, for "if the states regulate a given industry adequately, labor disputes in that industry might well

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[6] *See* Elyssa Cherney, "Ending First Charter School Strike in U.S., Teachers Celebrate Tentative Contract Agreement," *Governing* (Dec. 10, 2018), available at http://www.governing.com/topics/education/tns-chicago-charter-teachers-strike.html (accessed Feb. 28, 2019).

be reduced to the point where their impact on commerce would be insignificant." *New York Racing Ass'n*, 708 F.2d at 53. This is one of the reasons the Board has long considered that a state's provision for regulation of labor relations in an industry weighs in favor of declination. *See, e.g.*, *Pinkerton's Nat'l Detective Agency*, 114 N.L.R.B. at 1364; 38 Fed. Reg. 9537.

When the New York State Assembly enacted New York's charter school law, it expressly extended the processes and procedures of its state collective bargaining law to cover charter schools and their employees. *See* N.Y. Educ. Law § 2854(3)(c). And, at least prior to the Board's decision in *Hyde Leadership Academy*, New York's Public Employment Relations Board took jurisdiction over all charter schools in the state. *See, e.g., Brooklyn Excelsior Charter School and National Heritage Academy*, 44 PERB ¶ 3001 (2011) ("Based upon our careful examination of the provisions of the Charter Schools Act, we conclude that it explicitly and implicitly makes the Act applicable to every New York charter school.").

Collective bargaining provides an institutional channel for the resolution of labor disputes as an alternative to self-help. Given that New York has extended full collective bargaining rights to charter school employees, as detailed further below, there is little likelihood that work stoppages would occur in New York's charter sector that would significantly impact interstate commerce. To reiterate, there have been no charter school strikes throughout the more than two decades that charter schools have existed in the state. Indeed, although this is not crucial to the analysis, it bears noting that New York's collective-bargaining law prohibits strikes by covered employees, *see* N.Y. Civil Service Law § 210(1), while also providing mechanisms for the peaceful resolution of bargaining impasses, *see* N.Y. Civil Service Law § 209(3).

In this regard, it is significant that during the wave of educator walkouts that erupted in 2018, the states that saw the most extensive state-wide demonstrations and consequent school closures—West Virginia, Arizona, and Oklahoma—were ones that provided no collective bargaining rights for public school teachers.[7] In the absence of an institutional channel for the resolution of issues of pay, benefits, and working conditions in the public school systems, the more likely it is that disputes will widen and begin focusing "on state budgets and state decisions about healthcare and pensions," thus encouraging statewide walkouts directed at policymakers, even in states where strikes are prohibited.[8]

B. New York Charter Schools Have a Special Relationship with the State of New York and Its Public School System

As we have seen, the Board has declined jurisdiction on the basis of an industry's "special relationship" with a state. The Board has found such a relationship when the businesses within an industry "are permitted to operate by reason of special State dispensation," *Hialeah Race Course*, 125 N.L.R.B. at 391, where they form a part of an important state program, are deemed to be "instrumentalit[ies]" of the state, and are subsidized by the state, *Temple Univ.*, 194 N.L.R.B. at 1161, and where they are subject to extensive state regulation and reporting requirements, *id.*; *Hialeah Race Course, Inc.*, 125 N.L.R.B. at 391; 38 Fed. Reg. 9537. On these standards, there can be no doubt that New York

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[7] *See* "Behind the teacher strikes that have roiled five states: Why non-union states have seen the most unrest," *The Economist* (May 5, 2018), available at https://www.economist.com/united-states/2018/05/05/behind-the-teacher-strikes-that-have-roiled-five-states (accessed Feb 28, 2019).

[8] Stan Karp and Adam Sanchez, "The 2018 Wave of Teacher Strikes: A Turning Point for Our Schools?" *Rethinking Schools* (Summer 2018), available at https://www.rethinkingschools.org/articles/the-2018-wave-of-teacher-strikes (accessed Feb. 28, 2018).

charter schools have such a special relationship with the state and the state's public school system.

(1) New York charter schools, first of all, are manifestly "permitted to operate by reason of special State dispensation." Indeed, in New York, charter schools can only come into existence by reason of multiple layers of state authorization. At the highest level, charter schools can only exist and operate in the State of New York by reason of enabling legislation passed by the State Assembly and signed by the Governor. The New York Charter Schools Act of 1998, 1998 Sess. Law News of N.Y. Ch. 4 (S. 7881), was enacted "to authorize a system of charter schools to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate independently of existing schools and school districts in order to accomplish" various state education objectives. N.Y. Educ. Law § 2850. And the law prescribes the circumstances under which the state creates charter schools and their governing corporations.

Under the Charter Schools Act, charter schools, and the education corporations that operate them, owe their very existence to acts of state governmental bodies and officials. Eligible persons desiring to operate a charter school must first submit a detailed application to the appropriate "charter entity," each of which is a state or local government body or official. *Id.* § 2851(1)-(3). The charter entity may only approve the application if it determines that the proposed charter school meets all requirements of the law and applicable regulations and satisfies a host of other requirements. *Id.* § 2852(2). In the case of a proposed conversion charter school, like KIPP Academy here, the charter entity must also hold a vote among the parents of the students who are enrolled at the public school; a majority in favor of conversion is required to convert the school. *Id.* § 2851(3)(c).

If the charter entity approves the application, the applicant and the charter entity must enter into a proposed written agreement—the charter—under which the proposed charter school is to be organized and operated. *Id.* § 2851(2)(g). The proposed charter is then submitted to the New York Board of Regents, which oversees all public education activities throughout the state, *id.* § 101, to determine whether it satisfies the standards set forth in the statute, *id.* § 2852(5)(a). If the Board of Regents so determines, it "incorporate[s] the charter school as an education corporation for a term not to exceed five years," *id.* § 2853(1)(a), and it is only then that "the education corporation organized to operate a charter school shall have all corporate powers necessary and desirable for carrying out a charter school program." *Id.* § 2853(1)(b).

(2) Charter schools in New York also plainly (a) carry out important state functions as part of the state's system of public education; (b) are deemed by state law to be public entities for all relevant purposes; (c) are subsidized with public funds; and (d) are subject to significant state oversight and regulation.

(a) The Charter Schools Act provides that a New York charter school is a "public school"—subject to specific and limited exceptions not relevant here—that performs "essential public purposes and government purposes of this state." *Id.* 2854(3)(c) and (d). It is beyond cavil that providing for public education is a paramount responsibility of a state. *See Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). Indeed, the provision of free public education in New York, as in every state in the Union, is a state constitutional duty. *See* N.Y. Const. Art. XI, § 1 ("[T]he

legislature shall provide for the maintenance and support of a system of free common schools…").

(b) New York law also clearly makes charter schools instrumentalities of the state for state-law purposes. The Charter Schools Act provides that "[a] charter school shall be deemed an independent and autonomous public school, except as otherwise provided in this article, and a political subdivision having boundaries coterminous with the school district or community school district in which the charter school is located." N.Y. Educ. Law § 2853(1)(c). It also provides that "the board of trustees of [a] charter school shall constitute a board of education," and that "a charter school shall be deemed to be a public employer," for the purposes of the state's public-sector collective bargaining law, known as the Taylor Law. *Id.* § 2854(3)(a).

(c) New York charter schools receive virtually all of their funding from public tax revenues, although, unlike traditional public schools in the state, charters can also receive outside funding. Charter schools in New York receive public funds according to the per-pupil allocation for the district in which the charter school operates, while charter schools serving students from more than one district receive basic funding according to multiple districts' per-pupil allocations. *Id.* § 2856(1).

(d) The law further provides for significant state oversight and regulation over charter schools. The statute requires both the Board of Regents and the charter entity to "oversee each school approved by such entity, and may visit, examine into and inspect any charter school, including the records of such school, under its oversight," and makes clear that this oversight "shall be sufficient to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions." *Id.* § 2853(2).

The Charter School Law also imposes on charter schools a host of regulations and restrictions that apply only to public agencies and public officials. Charter school teachers in New York must, with certain limited exceptions, "be certified in accordance with the requirements applicable to other public schools." *Id.* § 2854(3)(a-1). Charter schools must "meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools" and are subject to public financial audits. *Id.* § 2854(1)(b) & (c). Charter school officials are prohibited from engaging in a range of conduct that evinces a conflict of interest (*e.g.*, soliciting or receiving certain gifts, disclosing or making personal use of confidential information acquired in the course of official duties, or receiving compensation in return for official actions) to the same extent that all New York public officials are, and the trustees of New York charter schools are subject to fines and removal from office for violating these prohibitions to the same extent that other municipal officers are. *Id.* § 2854(1)(f). New York charter schools must also comply with, *inter alia*, the freedom-of-information and open-meetings provisions of the New York Public Officers Law. *Id.* § 2854(1)(e).

In sum, because the State of New York has deemed charter schools to be public entities and subdivisions of the State of New York for the purpose of carrying out an essential state function, and because the state subsidizes and regulates charter schools accordingly, there is a special relationship between the charter schools and the state of a kind that warrants declination. It certainly cannot be said that the relationship between New York and its charter schools is any less "special" than that between states and the horse-racing and dog-racing industries.

C. Declination Will Not Leave Labor Relations Among New York Charter Schools Unregulated

Finally, as is already clear from the foregoing, the Board's exercise of its discretion to decline jurisdiction is appropriate here because doing so will not leave labor relations at New York charter schools unregulated. As we have seen, the New York Charter Law expressly applies the state public-sector labor law, N.Y. Civ. Serv. Law §§ 200-214, to charter schools and their employees. The Taylor Law establishes a robust set of collective bargaining rights and processes that have governed labor relations among New York public employers for more than fifty years. In overview, the law guarantees employees the right to form, join and participate in any employee organization or to refrain from doing so, the right to be represented by employee organizations of their choosing, and the right to negotiate collectively with their employers regarding terms and conditions of employment and the administration of grievances. N.Y. Civil Serv. Law §§ 202-203. It makes bargaining with a majority representative mandatory as to salaries, wages, hours and other terms and conditions of employment, *id.* §§ 201(4) and 204(3), and it provides impasse-resolution procedures to resolve bargaining deadlocks without resort to self-help, including voluntary interest arbitration, *id.* § 209(2).

In short, New York law provides as full a panoply of collective bargaining rights and procedures as one can expect from any mature collective bargaining system. Declination by the Board will plainly not leave labor relations at New York charter schools unregulated.

CONCLUSION

For the foregoing reasons, *amici* submit that, on the assumption that the Board has statutory jurisdiction over New York charter schools, the Board should decline to exercise that jurisdiction.

Respectfully submitted,

/s/ Philip A. Hostak
Alice O'Brien
Philip A. Hostak
National Education Association
Office of General Counsel
1201 16th Street NW, Suite 820
Washington, DC 20036
Tel. (202) 822-7035
Fax: (202) 822-7033

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, I filed the foregoing brief *amicus curiae* electronically with the Board and served the parties below by electronic mail.

Michael Collins
BOND, SCHOENECK & KING, PLLC
600 Third Avenue, 22nd Floor
New York, NY
10016-1915
mcollins@bsk.com

Oriana Vigliotti
NYSUT
52 Broadway, Fl 9
New York, NY
10004-1614
ovigliot@nysutmail.org

/s/ Philip A. Hostak
Philip A. Hostak